Supreme Court, U.S.
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03-591

No.

In the Supreme Court of the United States

DALE E. WASHBURN,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an "adversary adjudication" action instituted by a government agency be deemed to be "substantially justified" within the meaning of the Equal Access to Justice Act ("EAJA") where the agency did not have the legal or jurisdictional authority to institute that action?

PARTIES TO THE PROCEEDING

All parties appear in the case caption. Petitioner, Dale E. Washburn ("Washburn"), was petitioner below and is a private citizen and resident of Joplin, Missouri. Respondent, Office of the Comptroller of the Currency ("OCC"), was respondent below and is a bureau of the U.S. Department of the Treasury ("Treasury) and an agency of the U.S. Government. John D. Hawke, Jr. is the Comptroller of the Currency ("Comp[illegible]ler") and the chief executive officer of the OCC.

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PETITION FOR CERTIORARI

Washburn respectfully petitions this Court for a Writ of Certiorari to review the Judgment and Order of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") entered on May 5, 2003.

OPINIONS BELOW

On July 11, 2003, the Court of Appeals entered orders denying Washburn's petitions for a panel rehearing (App. A, 1a) and rehearing en banc (App. A, 2a) which are not reported. On May 5, 2003, the Court of Appeals entered a judgment and order, *per curiam*, that affirmed a Final Order issued by the Comptroller that denied Washburn's application for an award under EAJA (App. B, 3a). The Court's Judgment and Order were entered "for the reasons stated by the Administrative law Judge ("ALJ") and adopted by the Comptroller," and are not reported. On May 2, 2002, the Comptroller entered a Final Order adopting a portion of the Initial Decision issued by the ALJ that denied Washburn's application for an award of fees under EAJA (App. C, 5a). The Comptroller's Final Order is not reported. On February 4, 2002, the ALJ issued an Initial Decision that recommended the Comptroller deny Washburn's application for an award of fees under EAJA (App. D, 7a). The ALJ's Initial Decision is not reported.

JURISDICTION

Petitions for a panel rehearing and rehearing *en banc* were timely filed and denied in orders entered by the Court of Appeals on July 11, 2003. This Petition was filed within the time prescribed by this Court and is timely. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Question Presented is rooted in an unusual dynamic that exists between four inter-related federal statutes and a single federal regulation pertaining to the imposition of enforcement sanctions for violations of the Bank Secrecy Act[1] ("BSA") and BSA-based implementing regulations.

(a) 12 U.S.C § 1818(i)(2) ("section 1818(i)(2)")
(b) 12 U.S.C. § 1818(s)(1) ("section 1818(s)(1)")
(c) 12 U.S.C. § 1818(s)(3) ("section 1818(s)(3)")
(d) 31 U.S.C. § 5321(e) ("section 5321(e)")
(e) 12 C.F.R. § 21.21 ("section 21.21")

Because of their number and length, extract copies of the foregoing statutes and referenced regulation (along with certain other statutes and regulations cited in this Petition) are included in Appendix E and are prefaced with an index on the first page thereof showing the page location of each.

STATEMENT OF THE CASE

A. Institution and Final Disposition of Agency Action

The OCC instituted a civil money penalty action against Washburn in February 2001 pursuant to section 1818(i)(2), charging that he had "aided and abetted" violations of section 21.21 that were allegedly committed by the Peoples National Bank, Seneca, Missouri ("Bank"), where Washburn served as

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[1] Although technically comprised of other provisions in the United States Code (*e.g.*, 12 U.S.C. §§ 1818(s) and 1829b, and 18 U.S.C. §§ 1956 and 1957), the provisions codified at 31 U.S.C. §§ 5311-5330 are generally understood as the "Bank Secrecy Act."

President.[2] Washburn formally denied all of the charges and exercised his right to a hearing. In preparation for a hearing scheduled to begin in October 2001, Washburn conducted extensive discovery over a period of several months and incurred substantial attorneys' fees and related expenses.

In mid July 2001, Washburn filed an amended answer to the charges, disputing the jurisdictional authority of the OCC to institute a civil money penalty action under section 1818(i)(2) for violations of section 21.21. The amended answer was supported by an analysis of the legislative history of BSA that tracked the design and development of the enforcement scheme crafted by Congress over the past 30 years regarding the manner in which the legislative objectives of BSA were to be administered; which agencies were charged with what responsibilities in the areas of examination oversight and regulatory enforcement; and what powers were vested with

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[2] Congress amended the BSA when it enacted section 1359(a)(1) of subtitle H of title I of the Money Laundering Control Act of 1986 (Pub. L. No. 99-570, 100 Stat. 3207-27). The new law was codified in the U.S. Code as a new section (s) of section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §1818(s). Paragraph (1) of that statute required all of the federal banking agencies to promulgate regulations requiring institutions subject to their examination authority to adopt policies and procedures designed to assure compliance with BSA. In accordance with that requirement, all of the affected agencies, including the OCC, promulgated and announced implementing regulations that were substantively identical with each other. *See, Procedures for Monitoring Bank Secrecy Act Compliance*, 58 Fed. Reg. 2858 (1987), adding, *inter alia*, 12 C.F.R. § 21.21 by the Comptroller.

the various agencies involved to facilitate the execution of their assigned enforcement responsibilities.[3]

The amended answer pointed out, *inter alia*, that Congress made its intentions very clear with regard to the precise manner in which it intended the OCC to enforce section 21.21. That regulation was promulgated pursuant to section 1818(s)(1); its sister provision in section 1818(s)(3) provides explicitly that with regard to violations of regulations promulgated under section 1818(s)(1), the responsible agency "shall issue an order" pursuant to the its cease and desist authority under either 12 U.S.C. §§ 1818(b) or 1818(c).

Section 1818(s)(3) is uncharacteristically specific regarding the identity of both the regulation violated as well as the identity of the specific sanction to be used to enforce violations of that regulation. Because of that specificity and the mandatory use of the word "shall" in the statute,[4] the

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[3] The results of the research conducted to prepare the legislative history and analysis appended to the amended answer were subsequently published. *See*, Woodrough, *Civil Money Penalties and the Bank Secrecy Act - A Hidden Limitation of Power*, 119 Bank. L. J. 46 (Jan. 2002).

[4] At the time section 1818(s)(3) was enacted in 1986, the OCC and the other banking agencies already had the power to institute a cease and desist action under 12 U.S.C. §§ 1818(b) or 1818(c) for violations of laws and regulations. Accordingly, Congress must have intended the term "shall" in section 1818(s)(3) to be construed in its mandatory sense, *i.e.*, whenever the agency determines the institution of formal enforcement action is appropriate to enforce violations of regulations promulgated under section 1818(s)(1), the agency must utilize its power to institute a cease and desist order for such violations. Otherwise, section 1818(s)(3) is nothing more than meaningless surplusage *vis-a-vis* the provisions of 12 U.S.C.

amended answer contended that section 1818(s)(3) was the controlling statute for enforcing violations of section 21.21, not section 1818(i)(2). The OCC dismissed the penalty action it instituted against Washburn a month later.[5]

B. Application for Award of Attorneys' Fees and Expenses Under EAJA and Final Agency Disposition

In September 2001, Washburn filed an application under EAJA for an award of the attorneys' fees and related legal expenses he had incurred defending the penalty action the OCC had dismissed a month earlier ("Application"). The Application demonstrated that all of the statutory elements in EAJA regarding an award under that statute were satisfied,

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§§ 1818(b) and 1818(c) - a circumstance this Court has repeatedly repudiated. *Duncan v. Walker*, 533 U.S. 167,174 (2001) and the decisions cited therein. *See* also decisions of this Court cited in this Petition, *infra*, at pp. 22-23.

[5] The time delay between the filing of the amended answer and the dismissal was due to misguided efforts of OCC Enforcement Counsel to use inaccurately styled papers to document the final disposition of the case. For example, the first document submitted for that purpose was styled as a "Notice of Settlement" that falsely stated the parties had reached "an informal resolution" of the charges. That filing resulted in a flurry of pleadings by the parties, including a Motion for Summary Disposition filed by Washburn in early August 2001. After the ALJ issued an order in mid-August directing the OCC to either "dismiss the charges or respond to Washburn's motion for summary disposition," the OCC filed a "Notice of Withdrawal" that announced all of charges issued against Washburn were withdrawn. The ALJ correctly treated that action as tantamount to a final order of dismissal (*see* 12 C.F.R. § 19.5(b)(7)) and ordered the action struck from the court's docket.

and that the documentary exhibits appended to the Application satisfied those elements requiring such documentation.

The OCC Enforcement Division ("OCC Enforcement") responded, arguing that the Application be denied on three grounds: (1) Washburn was not a "prevailing party;" (2) the agency's decision to institute the action was "substantially justified;" and (3) the fees and expenses claimed were not "incurred" by Washburn, as such terms are used in EAJA.

Since the penalty action had been dismissed prior to the scheduled hearing, there was no evidentiary record upon which to adjudicate the merits of the issues raised by the parties. Accordingly, and based upon the reasoning in *Kuhns v. Board of Governors of the Federal Reserve*, 930 F.2d 39, 43 (D.C. Cir. 1991), the ALJ issued an order, *sua sponte*, permitting the parties to submit documentary and testimonial materials in support of their respective positions for inclusion in the record. The parties submitted such materials, and the record was subsequently closed at the end of December 2001.

In early February 2002, the ALJ issued an Initial Decision regarding the merits of the Application ("ALJ Decision") (App. D, 7a-22a). The ALJ Decision determined that Washburn was a "prevailing party" and that the Application satisfied all but one of the remaining requirements of EAJA. Nevertheless, the ALJ Decision concluded that the OCC was "substantially justified" to institute the penalty action against Washburn, and therefore recommended that the Comptroller deny the Application.[6]

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[6] Since the only issue under review is the determination of substantial justification in the ALJ Decision (App. D, 16a-21a), and in order to provide an understanding of Petitioner's assessment of

The ALJ properly bifurcated assessment of the substantial justification requirement into the separate issues of "substantial justification in fact" and "substantial justification in law." *Pierce v Underwood*, 487 U.S. 530, 565-66 (1979). Although Washburn strongly disagrees with the treatment of "substantial justification in fact" in the ALJ Decision, this Petition is focused solely upon the legal sufficiency and accuracy of the analysis and determination in the ALJ Decision pertaining to the single issue of whether the OCC action against Washburn was "substantially justified in law."

With all due respect to the ALJ, the most egregious (and obvious) deficiencies of the ALJ Decision regarding that issue are twofold: (1) the abject absence of any reasoned analysis, and (2) the extremely abbreviated treatment accorded the issue. The entire discussion of the pivotal issue of substantial justification in law is contained in six short paragraphs and a concluding sentence, with the first four paragraphs devoted to merely paraphrasing the contentions of the parties.

The fifth paragraph (App. D, 18a) is not much better in terms of analytical content. In that paragraph, the ALJ noted, "Congress may grant similar authority to more than one department or agency," and implicitly argued that the power of the OCC to assess a civil money penalty for violations of section 21.21 (or any other regulation) reflected in section 1818(i)(2) simply overlaps with the same authority of Treasury in 31 U.S.C. § 5321 ("section 5321") to impose the same type of penalty for the same violations of law. Unfortunately, and rather than proceeding with any type of

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major developments in the case in tandem with their occurrence, the next few paragraphs of this statement of the case reflect Petitioner's critique of the referenced portion of the ALJ Decision.

analysis of those two statutes, the ALJ simply (and erroneously) assumed they provide overlapping authority to the OCC and Treasury to impose the same sanction for the same violation of law. The error is easily demonstrated with a simple side-by-side comparison of the terms in section 1818(i)(2) with those in section 5321 regarding the minimum standard of culpability required to be proven, and the maximum penalty amounts that can be imposed.[7]

Accordingly, the entire adjudicatory analysis of the linchpin issue of substantial justification in law is reflected in the following single paragraph and concluding sentence:

> More importantly, the statutory language relied upon by the OCC is unambiguous. Through FIRREA, Congress delegated to OCC, and the other banking agencies, the authority to assess civil money penalties for the violation of "any law or regulation." § 1818(i). Section 21.21 is unquestionably a valid regulation and, therefore, OCC may assess money penalties for its violation. *See Cousin v. OTS*, 73 F.3d 1242 (2nd Cir. 1996). Washburn's assertion that the lack of litigated cases alleging an aiding and abetting violation of § 21.21 shows the OCC knew it lacked legal authority, is unconvincing. An agency may not bring certain cases for a variety of reasons other than lack of authority. While diligent inquiry may be appropriate before advancing a new or untested enforcement

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[7] *Compare* 31 U.S.C. § 5321(a), as implemented by 31 C.F.R. § 103.57, *with* 12 U.S.C. §§ 1818(i)(2)(A)-(C). *See also*, Woodrough, *Civil Money Penalties and the Bank Secrecy Act - A Hidden Limitation of Power*, *supra*, at 53-54.

> position, in this case the regulation enforced and the enforcement authority are clear on their faces.
>
> OCC's reliance on the plain meaning of its statutory authority was reasonable, and its position [to institute the penalty action] was substantially justified in law. [App. D, 12a; emphasis added]

There has never been any contention the "unambiguous" and "plain meaning" characterizations of the terminology used in section 1818(i) are any better or worse than those attributes of the terminology in section 1818(s). The self-evident truth is that both of the statutes utilize equally "unambiguous" terms, thus making the "plain meaning" of both equally discernable. That being the case, the cited reasoning in the ALJ Decision that the reasonableness of the agency's reliance upon the "plain meaning" of only one of the two statutes in question was sufficient to deem the agency's decision to institute an action under that statute "substantially justified" is illogical on its face.

The fatal flaw of the ALJ Decision is that it never addressed the right question, or at best, only examined half of the problem. In this case, there are two equally clear and unambiguous statutes, and each has a "plain meaning" that can be reasonably interpreted as being applicable to the enforcement of violations of section 21.21. In determining whether the OCC's decision to use one of those statutes in lieu of the other was more "reasonable" and therefore "substantially justified" within EAJA, the ALJ Decision made two critical errors: (1) it only examined one of the statutes, and (2) it failed to determine whether the intended use of the statute was consistent with the purpose intended by Congress.

The purpose of section 1818(i)(2) is generic. That statute was enacted to enable the agency to enforce violations of any law or regulation (and certain other infractions) committed by persons or entities subject to the agency's enforcement authority by assessing a civil money penalty for such violations. In contrast, the purpose of section 1818(i) is very specific. That statute was enacted for the purpose of enabling the agency to enforce violations of a specifically identified set of regulations (*i.e.*, those promulgated pursuant to section 1818(s)(1)) by requiring the agency to use a specific power (*viz.*, its authority to issue a cease and desist order) to enforce such violations. The ALJ failed to recognize that distinction. Instead, the ALJ Decision strongly suggests that the OCC's "reliance" (which is characterized in the ALJ Decision as "reasonable") was premised on the agency's intended use of the statute for the purpose of assessing a penalty for violations of section 21.21, rather than for the purpose of enforcing violations of section 21.21 in accordance with law.

After the parties filed exceptions briefs detailing alleged errors in the ALJ Decision, the Comptroller entered a Final Order in early May 2002, denying the Application ("OCC Decision") (App. C, 5a-6a). The OCC Decision does not contain any analysis of any issue and simply adopted that portion of the ALJ Decision pertaining to the issue of substantial justification. Because of the dispositive effect of the adverse manner in which that issue was decided by the ALJ, the OCC Decision did not address the contention of OCC Enforcement that the fees and expenses claimed were not "incurred." In that same vein, the OCC Decision declined to either adopt or reject the finding in the ALJ Decision that Washburn was a "prevailing party," explaining that review of such determination was not necessary.

C. Appeal of OCC Decision to U.S. Court of Appeals for the D.C. Circuit and Final Disposition of That Appeal

Washburn filed a notice of appeal of the OCC Decision in early June 2002 with the Court of Appeals and argued two separate but inter-related theories: (1) the penalty action was not "substantially justified" within EAJA, and (2) the OCC acted in bad faith and seriously abused the agency's power to impose enforcement sanctions as well as the agency's adversary adjudication and hearing process.

In support of the first theory, Washburn argued the OCC could not have been "substantially justified in law" to institute the penalty action pursuant to section 1818(i)(2) for alleged violations of section 21.21, since the agency knew or should have known that it did not have the legal authority to institute such action pursuant to that statute, pointing out:

(1) the ALJ and OCC knew section 21.21 was promulgated pursuant to section 1818(s)(1) and that the "plain meaning" of the unambiguous provisions of section 1818(s)(3) required the agency to enforce violations of section 21.21 by using its power to issue a cease and desist order under 12 U.S.C. §§ 1818(b) or 1818(c);

(2) the ALJ and OCC knew or should have known the cannon of statutory construction that holds where two statutes (1818(i)(2) and 1818(s)(3)) appear to govern the same matter, the statute with the most specific terminology regarding its applicability is controlling, regardless of their enactment priority;

(3) the OCC knew that it and the other federal banking agencies had never at any time during the

past 13 years (*i.e.*, since section 1818(i)(2)(A) became law in 1989) instituted a penalty action under that statute based solely upon alleged violations of BSA or any of its implementing regulations, including section 21.21;[8] and

(4) the ALJ and OCC knew that the agency, as a bureau of Treasury, was familiar with the 1994 testimony of the Assistant Secretary of the Treasury for Enforcement, who testified before Congress on behalf of the Treasury Department in support of legislation that required the Secretary of the Treasury to delegate to the OCC and the other federal banking agencies the power to assess civil money penalties for violations of BSA and its implementing regulations, including section 21.21.

In support of the second theory, Washburn argued that the OCC acted in bad faith in instituting the penalty action and at the same time also abused the agency's enforcement powers and adversary adjudication process, pointing out:

(1) the OCC instituted a formal enforcement action against Washburn to assess a civil money penalty even though the agency knew at the time formal charges were issued that it did not have the legal authority to institute such action;

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[8] Because of that circumstance, the Question Presented in this case is one of first impression. Accordingly, except for the review by the Court of Appeals in this case, none of the courts of appeals in the other circuits have ever had occasion to consider the issue.

(2) the OCC issued formal charges against Washburn accusing him of "aiding and abetting" violations of section 21.21 that were committed by the Bank when it knew at the time it made such charges that the Bank had not committed such violations, as evidenced by the fact such violations were never mentioned by OCC examiners during the 2000 OCC examination of the Bank, and were not cited in the final 2000 OCC Report of Examination of the Bank upon which the charged violations of section 21.21 against Washburn were based; and

(3) the OCC issued formal charges against Washburn for the purpose of using the pendency of such charges as a weapon to intimidate and coerce Washburn to agree to the issuance of a civil penalty order by consent, and/or if Washburn refused to agree to such consent order, for the purpose of imposing the financial burden and expense that Washburn would incur to prepare for a hearing as a substitute "penalty" by secretly determining at the time the charges were issued to dismiss such charges prior to the commencement of any hearing that Washburn might request.[9]

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[9] In three different pleadings, OCC Enforcement explained: (1) the action against Washburn was dismissed "because of resource considerations;" (2) the agency "determined it was best not to expend its limited resources to litigate a matter involving the assessment of a $2,000 civil money penalty;" and (3) that "prior to incurring the immense cost associated with discovery," the agency "decided that it needed to conserve resources more than it needed to obtain a final order assessing a $2,000 civil money penalty order against Washburn." Since the total span of time between institution of the action (February 2001) and agency decision to dismiss (July

In sum, the OCC made a mockery of EAJA by perpetrating an elaborate (and highly unethical) hoax on Washburn that was extremely prejudicial and that will result in an enormous financial loss to Washburn unless this Court validates his claim for fees and expenses under EAJA.

Although OCC Enforcement had vigorously argued in earlier submissions that Washburn was not a "prevailing party," and that the fees and expenses claimed were not "incurred" by Washburn - even to the point of specifically preserving the right to make the latter argument in any appeal, both arguments were abandoned by the OCC in its reply brief to the Court of Appeals. Except for a generic general denial, the OCC did not respond directly to any of the arguments or allegations made by Washburn regarding the issues of bad faith or abuse of agency's enforcement powers. Rather, the agency simply suggested that the Court ignore Washburn's averments since they were not raised in any prior pleading or previously filed brief.

After oral arguments, the Court of Appeals entered its Judgment, *per curiam*, on May 5, 2003, affirming the OCC Decision "for the reasons stated by the Administrative Law Judge and adopted by the Comptroller." Washburn's petitions for rehearing were denied on July 11, 2003.

Due to the summary and adoptive nature of the rulings of the Comptroller and the Court of Appeals, that portion of the ALJ Decision pertaining to the determination the OCC action instituted against Washburn was "substantially justified"

2001) was only 5 months, all of the underlying information that presumably supported the truthfulness of such "explanations" must have been known at the time the action was instituted.

within the meaning of EAJA is the "decision below" for purposes of any review that may be undertaken by this Court.

REASONS FOR GRANTING THE PETITION

A. The Question Presented Is Important

In landmark legislation enacted into law in 1980, EAJA provides a limited waiver of sovereign immunity by the U.S. Government for the payment of attorneys' fees and expenses under certain conditions for purposes that Congress proclaimed served the national public interest. In doing so, Congress established a new paradigm and shift in public policy designed to enhance the integrity of governmental regulatory activities and policies and at the same time strengthen citizen confidence in the validity of actions taken by the multitude of agencies through which the federal government functions.

The primary catalyst of EAJA is the infusion of fundamental principles of equitable fairness and agency accountability as integral components of the manner in which all adversary adjudication proceedings are conducted to resolve disputes between government agencies and the citizenry they govern.

EAJA's purposes are very well documented and widely recognized. The Report of the House Committee on the Judiciary that preceded final passage of EAJA noted that the high cost of legal assistance and the superior resources and expertise of the federal agencies frequently acted to seriously deter private parties from challenging, defending against, or seeking review of unreasonable and unfounded actions instituted by such agencies.

> [EAJA] rests on the premise that certain individuals... may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified...by the disparity between the resources and expertise of these individuals and their government. [H.R.Rep. No. 96-1418, at 5-6 (1980)]
>
> When the cost of contesting a government order ...exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it. ... [T]he government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that [individuals] are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision making process. [*Id.*, at 9-10; emphasis added]

Congress clearly recognized the notion of "a more level playing field" embodied in EAJA was not only intended to benefit the financially disadvantaged citizen by providing a limited waiver for a fee award thus making the government agencies more accountable, but that it was also intended to serve a public purpose and further the public interest in several respects: (1) "by refining and formulating [sound] public policy" through the process of disputing unreasonable and unjustified agency actions based upon poor or misdirected

policies; (2) "by providing a concrete, adversarial test of government regulation" thereby providing added "legitimacy and fairness of law" to the adversary adjudication process; (3) by providing a vehicle or means by which agencies will be compelled to "develop and announce more precise rules;" and (4) by "curbing excessive regulation and the unreasonable exercise of government authority," thereby enhancing the quality and efficiency of the agencies that exercise supervisory oversight responsibilities and the power to impose substantial regulatory sanctions. [*Id.*, at 9-12]

Perhaps the most insightful reflection in the House Report on the measure that became EAJA was the precept that the new law would instill an internally driven desire within each agency to recognize and nurture the value of taking appropriate pro-active precautionary measures to ensure that the agency's decisions reflect an "informed deliberation."

> [EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, [it] becomes an instrument for curbing excessive regulation and the unreasonable exercise of government authority. In this context, the committee believes that [EAJA] serves the public interest. [*Id.*, at 12-13; emphasis added]

As a result of the final determination in this case that an agency can be substantially justified to institute an action (and therefore immune from liability under EAJA) even though, as a matter of law, the agency did not have legal or jurisdictional authority to institute such action, all of the foregoing pronouncements extolling the high-minded purposes and principles embodied in EAJA are essentially mooted and relegated to history as nothing more than rhetorical expressions of well-intentioned lip service. Indeed, the

summary manner in which the ALJ, the Comptroller, and the Court of Appeals treated the critical issue of substantial justification should give anyone serious pause.

Again, the final determination of the pivotal issue of substantial justification was not supported by any reasoned analysis; was not supported by any assessment of the law; was not supported by any meaningful consideration of the jurisdictional authority of the agency; and was not supported by logical thought or the application of common sense. Rather, the determination of that issue was premised upon an abbreviated and simplistic semantical construct of the phrase "any law or regulation" in section 1818(i)(2) (without any mention of section 1818(s)(3) and the impact of that statute) that was more reflective of the efforts of a grammarian than an adjudicatory officer or jurist.

If, in the course of determining whether an agency is substantially justified in instituting an action under EAJA, the sum value of a showing that demonstrates the lack of any legal authority of the agency to institute such action is reduced to zero (as was done in the ALJ Decision), Congress might just as well repeal the statute. How can EAJA possibly instill confidence and eliminate the "financial disincentive" in the minds of private citizens regarding the cost of engaging in a litigated proceeding to challenge an unreasonable or abusive agency action, if a determination of substantial justification can be made without any analysis or finding that considers the issue of whether the agency had legal authority to take the challenged action? The simple truth of the matter is: It can't.

The willingness of the ALJ and Comptroller to decide that an agency can be "substantially justified" within EAJA to institute an action against a financially disadvantaged private citizen without the slightest concern for or review of the

agency's underlying legal authority to take that action contravenes and works at cross-purposes with the legislative design and intent of EAJA. This Court held in *Sullivan v. Hudson,* 490 U.S. 877, 890 (1989) that EAJA is to be read and applied "in [the] light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action." There can be no doubt that the manner in which this case was handled and finally adjudicated shows very clearly that the admonition in *Sullivan* fell on deaf ears. In sum, there is nothing in the record of this action that can serve as a reasoned explanation founded in law that supports the pivotal finding that the OCC was "substantially justified" within EAJA irrespective of the agency's indisputable and total lack of jurisdictional authority to institute such action.

Finally, this Court in *Ardestani v. I.N.S.*, 502 U.S.129, 137 (1991) stressed the need for reviewing courts to be careful not to "assume the authority to narrow the waiver that Congress intended," in EAJA, citing *United States v. Kubrick*, 444 U.S. 111, 118, (1979), and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). The failure of the Comptroller and the Court of Appeals to correct the glaring deficiencies in the ALJ Decision regarding the jurisdictional authority of the agency did more than "narrow the waiver Congress intended" EAJA to provide. By adopting the ALJ Decision, the Comptroller and Court of Appeals effectively rescinded that waiver for Washburn and any other similarly situated person subject to the authority of the OCC.

B. The Issue of Substantial Justification Was Decided in the Decision Below in a Manner That Conflicts With Prior Rulings and Decisions of this Court

The Judgment and Order of the Court of Appeals ("decision below") affirmed the OCC Decision (which in turn, adopted

that portion of the ALJ Decision pertaining to the determination of substantial justification, "for the reasons of the Administrative Law Judge and adopted by the Comptroller." Since the referenced portion of the ALJ Decision are pages 16a-21a of Appendix D, the "decision below" is comprised of the discussion and findings reflected on those six pages. As demonstrated below, the cited portion of the ALJ Decision is fatally deficient and was decided in a manner that conflicts with prior decisions of this Court.

The decision below is predicated upon: (a) a review that is totally devoid of any type of reasoned analysis regarding the central issue of substantial justification in law and the jurisdictional authority of the OCC to institute a penalty action for violations of section 21.21; (b) an erroneous assumption that the legal authority of the OCC to enforce violations of section 21.21 pursuant to section 1818(i)(2) by imposing a civil money penalty for such violations overlaps the same authority of the Treasury to enforce the same violations of section 21.21 pursuant to section 5321 by imposing the same penalty for the same violations; and (c) a finding of substantial justification that completely disregards and turns a totally blind eye toward well established cannons of statutory construction that have been upheld by this Court and that, if applied in this case, would preclude a finding of substantial justification in law.

The touchstone issue of substantial justification in law in this case essentially asks the following question:

> Given a desire and intention of the OCC to enforce violations of section 21.21, and given the existence of two enforcement statutes [(*viz.*, section 1818(i)(2) and section 1818(s)(3)] that are equally clear in their terms and that can reasonably construed as being applicable

> to the enforcement of that regulation, is there any principle or rule founded in law that would convince a reasonable person to believe that the use of one of those statutes is preferred over the other (thereby making that statute the more reasonable choice and, therefore, "substantially justified" within EAJA) for the purpose of enforcing violations of section 21.21?

There are at least three well-established cannons of statutory construction[10] that answer that question in the affirmative. If those rules were applied properly in this case, it would be impossible to conclude that the OCC's decision to use and rely upon the provisions of section 1818(i)(2) for the purpose of enforcing violations of section 21.21 was more reasonable than applying and using the provisions of section 1818(s)(3).

The most compelling of the three cannons that have been repeatedly ignored in this case is the rule of construction that holds: in the absence of any legislative intent to the contrary, where there are two statutes that can be reasonably construed to govern the same matter, a clear preference is accorded to the statute that has the most specific terminology regarding its applicability, regardless of the enactment priority between the statutes. This Court has repeatedly upheld the application of

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[10] Loosely stated, the three rules are: (1) in the absence of a clear legislative intent to the contrary, a statute with "specific" terminology regarding its applicability will be given a preference over a statute of "general" application; (2) statutes must be construed in a manner that accords meaning to all of their terms as well as those contained in other statutes, and therefore cannot be construed in a manner that effectively renders the provisions of another statute as meaningless surplusage, and (3) the repeal of a statute by necessary implication will not be upheld in the absence of a determination of the existence of irreconcilable statutes.

that rule, holding that a "specific" statute[11] is never controlled or nullified by a "general" statute,[12] and that the more specific statute is given a preference over the general statute, regardless of their enactment dates.[13] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961; and *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902).

The final determination of substantial justification in this case subsumes and is dependent upon an interpretation of section 1818(i)(2) that effectively renders the provisions of not just one, but two other statutes as nothing more than meaningless surplusage contrary to both of the other rules of statutory construction that have been ignored by the ALJ, the Comptroller, and Court of Appeals. If section 1818(i)(2) is construed to empower the OCC to assess a civil money penalty for violations of section 21.21, the provisions of section 1818(s)(3) and section 5321(e) are effectively rendered meaningless and repealed by implication. This Court has

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[11] The unambiguous terms in section 1818(s)(3) regarding its applicability to violations of a specifically identified set of regulations (*viz.*, those promulgated under section 1818(s)(1)) is indisputably more specific that the general applicability of section 1818(i)(2) to a violation "of any law or regulation."

[12] *Ibid.*

[13] The priority of enactment of section 1818(i)(2) in 1989 as the more recent (and therefore more probative) expression of legislative intent is therefore irrelevant.

repudiated such treatment repeatedly. *Dole Food Co. v. Patrickson,* 123 S.Ct. 1655, 1661 (2003), *citing Mertens v. Hewitt Associates,* 508 U.S. 248, 258 (1993), and *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). *See also, Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); and *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945).

Based upon the foregoing series of events and circumstances, an inescapable conclusion clearly emerges, namely, the decision below was made in a manner that contradicted by the application of adjudicatory principles that have been validated in numerous prior rulings and decisions of this Court.

C. The Decision Below Is Patently Deficient and Validates an Agency Action Instituted in Bad Faith

As a pure matter of law, the OCC does not have (and has never had) jurisdictional authority to enforce violations of BSA and its implementing regulations (including section 21.21) by assessing a civil money penalty for such violations. That conclusion is underscored by the fact that there is unmistakable evidence showing that as late as 1994 (*i.e.*, 5 years after Congress enacted section 1818(i)(2)), Congress expressed its clear belief that the OCC and the other federal banking agencies did not have such authority.

Section 406 of Title IV[14] of the Riegle Community Development and Regulatory Improvement Act of 1994

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[14] Title IV is sometimes referenced by its popular name, the Money Laundering Suppression Act of 1994.

amended BSA by adding a new section (e) to 31 U.S.C. § 5321. As amended, that statute provides in applicable part:

> The Secretary of the Treasury... shall delegate ...any authority of the Secretary to assess a civil money penalty under this section on depository institutions ... to the appropriate federal banking agencies (as defined in section 3 [of the Federal Deposit Insurance Act]). [Emphasis added]

The Secretary of the Treasury has never complied with the Congressional directive reflected in section 5321(e). The resulting negative inference is overwhelming. Unless that statute is construed as nothing more than a meaningless legislative exercise, it is unmistakably clear that Congress itself (as the source of all regulatory enforcement authority granted to the OCC and the other federal banking agencies) proclaimed that as of 1994, Treasury was the only agency that had been empowered to assess a civil money penalty for violations of BSA or BSA- related regulations.

That fact coupled with the agency's *de facto* failure during the past 13 years to assert any authority under section 1818(i)(2) to assess a civil money penalty for any violation of BSA or BSA-based implementing regulation (including section 21.21), stand as irrefutable evidence that the OCC not only lacked jurisdictional authority to institute a penalty action under section 1818(i)(2), but also that the agency knew it did not have the legal authority to institute the penalty action it instituted against Washburn. In short, there is more than sufficient evidence in this record to demonstrate that the OCC charges issued against Washburn were issued in bad faith.

Common sense says that a void of any civil money penalty enforcement activity by any of the federal banking agencies

for any violation of any regulation promulgated pursuant to section 1818(s)(1) over a period 13 years is not an insignificant circumstance and cannot be dismissed as mere coincidence. Such a vacuum of agency enforcement activity, particularly when viewed in the context of the high level of policy coordination for regulatory enforcement that exists among all of the federal banking agencies, and coupled with the well-known testimony of the Assistant Secretary of the Treasury for Enforcement in 1994 regarding a need for Treasury to delegate civil money penalty authority to the OCC and other banking agencies for violations of BSA-based laws and regulations, serve as compelling and very strong indicators that the OCC had specific knowledge of the fact that it did not have any legal authority to institute a civil money penalty action for violations of section 21.21, and that the agency knew such to be the case when it instituted such action against Washburn for violations of that regulation.[15]

The penalty action against Washburn was instituted in bad faith and in a seriously misguided effort to coerce Washburn to execute an agreement for the issuance of a consent penalty order, or if that tactic failed and Washburn requested a hearing, the OCC would allow Washburn to incur substantial legal fees and expenses preparing for such hearing before terminating the action prior to any hearing so that the

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[15] Some might argue that the OCC action against Washburn was instituted as a "test" case to determine the validity of a new or novel legal theory of agency authority. The OCC has never made that argument. Indeed, OCC counsel essentially denied it during oral argument, insisting that the agency had issued numerous consent penalty orders in past years for violations of section 21.21. The public record, however, does not substantiate that claim.

expenses incurred by Washburn could serve as a "substitute penalty" the agency wanted to assess.

The calculated decision of the OCC to institute an action even though it knew it lacked the legal or jurisdictional authority to do so, and even though it also knew the violations of law charged in that action were not supported,[16] and then to compound such errors by pretending to offer Washburn the right to a hearing in order to use the expense of participating in the agency's adjudicatory process as a means of inflicting a financial penalty, all constitute wanton and malicious abuses of legal process. On that basis alone, this Court has the inherent authority to summarily grant the petition, vacate the decision below, and remand with instructions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

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[16] *See* Petition, *supra*, pp.12-13, para. (2).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1171

[Filed July 11, 2003]

Dale E. Washburn, Appellant	)
v.	)
Office of the Comptroller of the Currency, Appellee	)

JUDGES: Before Ginsburg, Chief Judge, and Henderson and Randolph, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing filed June 19, 2003, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ _____
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1171

[Filed July 11, 2003]

Dale E. Washburn, Appellant	)
	)
v.	)
	)
Office of the Comptroller of the Currency, Appellee	)

JUDGES: Before Ginsburg, Chief Judge, and Henderson and Randolph, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1171

[Filed May 5, 2003]

Dale E. Washburn,	)
Appellant	)
v.	)
	)
Office of the Comptroller of the Currency,	)
Appellee	)
	)

Appeal of Final Decision and Order of the
Office of the Comptroller of the Currency
[OCC Docket No. AA-MW-01-04]

JUDGES: Before GINSBURG, Chief Judge, HENDERSON and RANDOLPH, Circuit Judges.

MANDATE

Pursuant to the provisions of Fed.R. App. Pro. 41(a)
[Issued August 4, 2003]

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

JUDGMENT

This cause was considered on the record from the Office of the Comptroller of the Currency and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the decision and order of the Comptroller be AFFIRMED for the reasons stated by the Administrative Law Judge and adopted by the Comptroller. *See In the Matter of Dale E. Washburn, Equal Access to Justice Applicant,* AA-EE-01-15. The position of the Office of the Comptroller of the Currency in initiating a proceeding for a civil money penalty against Washburn was "substantially justified" within the meaning of 5 U.S.C. § 504(a)(1).

Pursuant to D.C. *Circuit Rule 36*, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
WASHINGTON, D.C.

AA-EC-01-15

[Filed May 2, 2002]

In the Matter of	)
	)
DALE E. WASHBURN	)
Equal Access to Justice Applicant	)
	)

DECISION and ORDER

This matter is before the Comptroller of the Currency on requests from the Applicant and from Enforcement Counsel for agency review under 31 C.F.R. § 6.15 of the Administrative Law Judge's Initial Decision denying Applicant's application for attorney fees and related expenses under the Equal Access to Justice Act, 5 U.S.C. § 504. Applicant, who is the former president of Peoples National Bank, Seneca, Missouri, filed the application after the Comptroller of the Currency, through his designee, withdrew a Notice of Assessment of Civil Money Penalty. The Administrative Law Judge concluded that Applicant was the "prevailing party" but that the OCC's position in initiating the

civil money penalty proceeding was "substantially justified" within the meaning of the statute.

The Comptroller finds that deciding the "prevailing party" issue is unnecessary in light of the Administrative Law Judge's soundly reasoned analysis of whether the OCC's position was "substantially justified." Accordingly, the Comptroller adopts the Administrative Law Judge's analysis and conclusion on the latter, and denies the parties' requests for agency review.

SO ORDERED this 2nd day of May, 2002.

/s/ _____
JOHN D. HAWKE, JR.
Comptroller of the Currency

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
WASHINGTON, D.C.

AA-EC-01-15

[Filed February 4, 2002]

IN THE MATTER OF	)
	)
DALE E. WASHBURN	)
Equal Access to Justice Applicant	)
	)

INITIAL DECISION ON EAJA APPLICATION

SUMMARY

Dale E. Washburn ("Washburn" or "Applicant") has applied for attorneys' fees and related expenses under the Equal Access to Justice Act ("EAJA" or "the Act"), 5 U.S.C. § 504. For the reasons that follow, I find that, although Washburn was the prevailing party in the underlying adjudicative proceeding, the Office of the Comptroller of the Currency ("OCC" or "Enforcement Counsel") was substantially justified in initiating that proceeding, and, therefore, Washburn is not entitled to an EAJA award.

PROCEDURAL HISTORY

On September 25, 2001, Dale E. Washburn ("Washburn" or "Applicant") filed an application for attorneys' fees and related expenses ("Application") incurred in defense of an enforcement proceeding. That proceeding was initiated against him on February 13, 2001, and terminated on August 30, 2001, prior to any hearing (the "enforcement" or "underlying" proceeding). *In re Washburn*, No. AA-MW-01-04. Enforcement Counsel answered the EAJA Application on October 25, 2001. Applicant filed a reply on November 13, 2001, and Enforcement Counsel filed its reply on December 3, 2001. On November 7, 2001, Applicant moved to strike as extraneous factual assertions and supporting affidavits attached to Enforcement Counsel's Answer. Since there was no hearing record and supplementation was necessary, the motion was denied. *See Kuhns v. Board of Governors of the Federal Reserve System*, 930 F.2d. 39, 43 (D.C. Cir. 1991); 31 C.F.R. § 6.13(c). However, Washburn was allowed to supplement the record with affidavits and documents in support of his Application, which were received in full on December 13, 2001.

Because the Secretary of Treasury's regulations governing OCC EAJA applications (31 C.F.R. § 6) had expired and had not been reauthorized, the parties stipulated that, though expired, they would govern this proceeding. *See* §§ 6.2-6.3. That stipulation and the parties' further stipulation, that if the regulations conflicted with the Act, the Act would govern, were confirmed by order. *Order on Stipulation*, Nov. 5, 2001.

The underlying proceeding began on February 13, 2001 with the issuance of a Notice of Assessment of a Civil Money Penalty ("Notice") pursuant to 12 U.S.C. § 1818(i). The Notice alleged that Washburn caused, brought about, participated in, counseled, or aided or abetted violations of 12 C.F.R. § 21.21 at Peoples National Bank, Seneca, Missouri ("Bank"), when he served as president, compliance officer, and Bank Secrecy Act ("*BSA*") officer. Section 21.21 requires national banks to establish and maintain procedures reasonably designed to ensure their compliance with the recordkeeping and reporting requirements of *BSA*. Washburn filed an Answer on March 6, 2001.

Following a telephonic scheduling conference, an order issued on March 30, 2001, adopting a prehearing schedule and setting a hearing in October 2001. On July 18, 2001, Washburn served an Amended Answer. On August 6, 2001, Enforcement Counsel first filed a Notice of Settlement and then a Notice of Dismissal. Washburn gave notice that no settlement had occurred, moved for summary disposition, and filed a response to the Notice of Dismissal. Various letters were exchanged between the parties and filed with the undersigned.

Because there was confusion as to the status of the dismissal, on August 10, 2001, the proceeding was stayed and, on August 14, 2001, Enforcement Counsel was directed either to answer Respondent's Motion for Summary Disposition or to provide documentation that the Comptroller had dismissed the proceeding, as only the Comptroller has dismissal authority. *See* 12 C.F.R. § 19.5(b) (7). On August 28, 2001, Enforcement Counsel filed a Notice of Withdrawal, in which the Comptroller, through his authorized designee,

withdrew the Notice. On August 30, 2001, the matter was terminated and a Notice of Removal was issued.

EAJA REQUIREMENTS

EAJA provides that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1).

To be eligible for an award, an applicant must meet the size and net worth conditions set forth in EAJA and the regulations (5 U.S.C. § 504(b)(1)(B); 31 C.F.R. § 6.4) and submit an application that meets the statutory and regulatory requirements (5 U.S.C. § 504(a)(2); 31 C.F.R. §§ 6.8 - 6.11). That Washburn has done so is not in question.

ISSUES FOR DECISION

The primary issues to be resolved are (1) Whether Applicant was the prevailing party; and if so, (2) Whether the agency was substantially justified in issuing the Notice initiating the enforcement proceeding; and, if not, (3) Whether Applicant is entitled to the fees and expenses claimed.

PREVAILING PARTY

Applicant argues that he is the prevailing party because OCC unilaterally terminated the adversary adjudication without having obtained assessment of the $2,000 penalty sought in the Notice or any other sanction. Although the Notice of Withdrawal indicates that a letter of reprimand was sent to Washburn, he asserts that he never received it and, in any event, such letters are unenforceable and determinative of nothing. *Application*, at 4-6. By contesting the Notice, Applicant maintains, he received all the relief he sought (no assessment of any civil penalty against him) and is clearly the prevailing party. Case law, he urges, shows that a party prevails when it obtains a significant part of the relief it sought and the lawsuit was a catalytic, necessary, or substantial factor. *Maduka v. Meissner*, 114 F.3d 1240 (D.C. Cir. 1977); *Applicant's Reply*, at 11-13.

OCC disputes that Applicant prevailed because he received no relief on the merits of his claim and no enforceable settlement agreement. He was not victorious, it argues, and, even if he were, his claimed success was not due to anything he accomplished in the underlying proceeding. OCC decided to withdraw the Notice "prior to incurring the immense cost associated with discovery" because "it needed to conserve resources more than ... to obtain a final order assessing a $2,000 civil money penalty against the Applicant." Also, OCC argues, the case law cited by Applicant, which describes what is commonly referred to as the "catalyst theory," no longer applies to EAJA claims after the Supreme Court's recent decision in *Buckhannon Bd. & Care Home, Inc., v. West Virginia Dept. of Health and*

Human Resources, 532 U.S. 598 (2001). *OCC's Response to Applicant's Reply*, at 5-8.

The *Buckhannon* Decision

In *Buckhannon*, the Supreme Court, in a five-to-four decision, held that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the fee-shifting provisions of the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12205. At issue in the underlying proceeding was a state statute. While that proceeding was still pending, the state legislature changed the statute, which gave Buckhannon the objective of its lawsuit and mooted the case. The Court found an award under those circumstances impermissible because there had been no change in the legal relationship of the parties. *Id.* at 1839-40. Examining the plain meaning of the term "prevailing party" and its prior cases construing the term, the Court concluded that a prevailing party must obtain at least some judicial relief based on the merits of his or her claim, such as an enforceable judgment on the merits or a settlement agreement enforceable through a court-ordered consent decree. *Id.* The Court explicitly rejected the catalyst theory (achieving the desired results because the lawsuit brought about a voluntary change in the other party's conduct) as a means of obtaining prevailing party status since it required "no judicially sanctioned change in the legal relationship of the parties." *Id.* at 1838, 1840. A party's voluntary change in conduct lacks "the necessary judicial *imprimatur* on the change." *Id.* at 1840.

Buckhannon's Applicability

Although *Buckhannon* does not mention EAJA and cites no cases arising under EAJA, there are good reasons to believe the Court intended to extend its ruling beyond the fee-shifting statutes before it. The opinion begins by observing, "Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party'", and then poses the question for decision, "whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree," and concludes that it does not. *Id.* at 1838. Later, the Court notes instances where Congress has authorized fee awards to "the prevailing party" and references the appendix to Justice Brennan's dissent in *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985), a lengthy list of fee-shifting statutes, including EAJA. *Id.* at 1839. In an accompanying footnote, the Court states that it has interpreted the fee-shifting provisions of these statutes consistently and "so approach[es] the nearly identical provisions at issue here." *Id.* at 1839, n.4.

EAJA's provisions, however, differ significantly from the statutory fee-shifting provisions at issue in *Buckhannon*, which were enacted in connection with laws designed to advance civil rights. Those fee-shifting provisions grant substantially more discretion to the trial court in deciding whether to award fees.[1] The judge need not consider whether

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[1] By way of example, the Fair Housing Amendments Act, one of the statutes at issue in *Buckhannon*, provides in relevant part: "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The

the government's position in the underlying action was substantially justified or whether special circumstances would make an award unjust, as is required by EAJA. In addition, EAJA bars awards to parties capable of shouldering litigation expenses by imposing size and net worth limits on applicants. 5 U.S.C. § 504(b)(1)(B).

Because of these differences, one court has concluded that *Buckhannon* does not apply to EAJA proceedings. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738 (2001). In the three other reported cases to consider the issue, *Buckhannon* was applied and EAJA claims based on the catalyst theory were denied. *Sileikis v. Perryman*, 2001 WL 965503 (N.D.III.); *Alcocer v. INS*, 2001 WL 1142807 (N.D. Tex.); *Former Employees of Motorola Ceramic Products v. United States*, 176 F.Supp.2d 1370 (CIT 2001). Given *Buckhannon*'s clear and unqualified ruling, I agree that its dictates apply to EAJA proceedings and that prevailing party status cannot be achieved without a judicially sanctioned change in the parties' legal relationship.

Judicial *Imprimatur*

Buckhannon gives two examples of judicially sanctioned material alterations in the parties' legal relationship: judgment on the merits and a court-ordered consent decree. A voluntary settlement lacks the necessary judicial *imprimatur* on the change and, therefore, cannot support an award. *Id.* at 1840.

United States shall be liable for such fees and costs to the same extent as a private person." 42 U.S.C. § 3613(c)(2).

Other circumstances that may qualify remain to be articulated in later decisions.

Judgment for a plaintiff entered on an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure was found to be sufficient in a proceeding under the ADA fee-shifting provisions. Though the defendant admitted no liability, the judgment was enforceable and, therefore, the court reasoned, changed the parties' legal relationship. *Aynes v. Space Guard Products, Inc.*, 201 F.R.D. 445 (S.D. Ind. 2001).

The enforcement proceeding against Washburn ended by the Comptroller's withdrawal of the Notice. While the Comptroller is not a judge, he performs an adjudicatory function. In administrative adjudicative proceedings brought pursuant to 12 U.S.C. § 1818(i) and conducted pursuant to 12 C.F.R. § 19, such as that brought against Washburn, all final adjudicative decisions are made by the Comptroller. *See* 12 C.F.R. § 19.5(b)(7) ("[O]nly the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding"). By exercising his judicial authority to dismiss proceedings, the Comptroller brought about a change in the legal relationship of the parties. The Notice assessed a $2,000 civil money penalty against Washburn and the withdrawal removed that assessment. The Comptroller's withdrawal gave a judicial *imprimatur* to that change. Washburn, thus, obtained prevailing party status.

SUBSTANTIAL JUSTIFICATION

A prevailing party cannot be awarded fees if the government's position in the underlying proceeding was substantially justified. Substantially justified means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The government's position must be reasonably based both in law and fact, and be more than merely undeserving of sanctions for frivolousness. *Id.* at 565-66. It must be "clearly reasonable, well founded in law and fact, solid though not necessarily correct." *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (italics and citations omitted). The government need not show either that a large amount of evidence supported its position, or that it was likely to prevail on the merits. *Kuhns*, 930 F.2d at 43; *Foley Construction Co. v. United States Army Corps of Engineers*, 716 F.2d 1202, 1203 (8th Cir. 1983) (citation omitted). In this case, the governing regulations provide explicitly that there is no presumption that "the agency's position was not substantially justified simply because the agency did not prevail." 31 C.F.R. § 6.5(a)(2).

Reasonable Basis In Law

In the enforcement proceeding, Washburn was charged with aiding or abetting violations of 12 C.F.R. § 21.21 that required the Bank to have sufficient procedures to ensure compliance with *BSA* and its implementing regulations, 31 U.S.C. §§ 5311 *et seq.*; 31 C.F.R. § 103. The Notice assessed a $2,000 civil penalty against Washburn pursuant to 12 U.S.C. § 1818(i), which authorizes the OCC to assess penalties against "any institution-affiliated party" who

"violates any law or regulation". § 1818(i)(2)(A)(i). "Violation" includes aiding or abetting a violation. § 1813(v). Enforcement Counsel maintains these provisions clearly authorize assessment of the penalty. Washburn asserts OCC knew or should have known that it lacked the authority.

Washburn's principal argument is that the authority to assess civil money penalties for violations of *BSA* resides exclusively with the Secretary of the Treasury ("Treasury"). His analysis is set out in a 12-page Memorandum of Points and Authorities attached to his Application. As background, he discusses *BSA* statutes enacted in 1970, 1982, and 1986.[2] His position is essentially that in the 1982 legislation, Congress granted civil money penalty authority to Treasury only and that Treasury alone still holds that authority. The 1986 legislation, in a part now codified at § 1818(s), mandated that the banking agencies adopt regulations that would require banks to establish procedures to assure compliance with bank secrecy requirements. OCC did so by adopting 12 C.F.R. § 21.21. The 1986 legislation also gave the agencies cease and desist authority to enforce their new regulations, but not civil money penalty assessment authority. *See* § 1818(s)(3).

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat 183 (1989), increased the banking agencies'

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[2] The Bank Records and Foreign Transactions Act, Pub. L. No. 91-508, Titles I and II, 84 Stat. 1114 (1970); Sections 1356 of Title I of Pub. L. No. 97-258, 99 Stat. 877 (1982); Money Laundering Control Act of 1986, Section 1359(a) of Pub. L. No. 99-570, 100 Stat. 3207-18 (1986).

enforcement powers to include assessment of civil money penalties for violation of "any law or regulation." Congress did not delete or change its earlier § 1818(s) grant of cease and desist power to the banking agencies to enforce their bank secrecy regulations. In the Money Laundering Suppression Act of 1994, Congress instructed Treasury to delegate the authority to assess civil money penalties on financial institutions to the banking agencies, but there is not record that it has done so. Pub. L. No. 103-325, § 406, 108 Stat. 2247 (1994).

Thus, Washburn concludes that Congress has delegated civil money penalty assessment authority to enforce *BSA* and related regulations to Treasury only. Since Treasury has not made a delegation of its authority, Treasury, not OCC, has all of the authority.

There is substantial reason to disagree with Washburn's conclusions. To achieve its objectives, Congress may grant similar authority to more than one department or agency. The legislative history of FIRREA cited by both parties evidences such an intent. It notes that Treasury and the Department of Justice may have concurrent penalty authority with the banking agencies in some situations and warns that "a civil money penalty could not be assessed twice against the same party for the same violation." 135 Cong. Rec. 2379-02, at 2393 (1989).

More importantly, the statutory language relied upon by OCC is unambiguous. Through FIRREA, Congress delegated to OCC, and the other banking agencies, the authority to assess civil money penalties for the violation of "any law or regulation." § 1818(i). Section 21.21 is unquestionably a valid

regulation and, therefore, OCC may assess money penalties for its violation. *See Cousin v. OTS*, 73 F.3d 1242 (2nd Cir. 1996). Washburn's assertion that the lack of litigated cases alleging an aiding or abetting violation of § 21.21 shows OCC knew it lacked legal authority, is unconvincing. An agency may not bring certain cases for a variety of reasons other than lack of legal authority. While diligent inquiry may be appropriate before advancing a new or untested enforcement position, in this case the regulation enforced and the enforcement authority are clear on their faces.[3]

OCC's reliance on the plain meaning of its statutory authority was reasonable, and its position was substantially justified in law.

Reasonable Basis in Fact

The regulation allegedly violated in the enforcement proceeding, 12 C.F.R. § 21.21, requires national banks to develop and maintain a program reasonably designed to assure and monitor compliance with *BSA* recordkeeping and reporting requirements. The regulation places four requirements on banks (1) to provide a system of internal controls, (2) to provide for independent testing of compliance, (3) to designate an individual responsible for monitoring day-to-day compliance and (4) to provide training for appropriate personnel. Washburn was the bank's president, compliance officer, and *BSA* officer. OCC alleged that he aided or abetted

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[3] Washburn raises other grounds to fault OCC's issuance of the Notice in his lengthy filings. To the extent such grounds are not specifically discussed, they have been found without sufficient merit to warrant discussion.

the bank's violation by failing to establish and maintain procedures to ensure compliance with § 21.21.

An OCC examination disclosed that the Bank had failed to file many large currency transaction reports during a 12-month period, in violation of a *BSA* regulation. The signed declaration of one of the bank examiners conducting the examination describes Washburn's responsibility for and failure to assure that the Bank performed the four specific requirements of § 21.21. She stated that the reporting failures might have been averted had the Bank complied with § 21.21. A signed declaration of the examiner-in-charge confirmed the examiner's conclusions. *OCC Answer*, Ex. B.

Washburn finds this information insufficient to constitute a reasonable factual basis for the charges against him and insists that more specific details, such as the number of violations, their dates, and durations, are required. Washburn also argues that OCC has shown less than the preponderance of factual evidence required to prevail, and that the affidavits and documents he has submitted provide an evidentiary basis to conclude that the Bank's reporting violations were not caused by either the Bank's or Washburn's failure to comply with § 21.21. *Applicant's Reply*, at 28; *Amended Application for Award of Attorneys' Fees and Related Expenses*, at 3-4.

Washburn misconstrues the showing required. Reasonable basis in fact is the applicable standard, and is judged at the time the Notice was issued. *Bowey v. West*, 218 F.3d 1373 (Fed. Cir. 2000). The information offered by OCC provides a reasonable factual basis for issuance of the Notice. Examiners are to be given "significant deference" and their opinions carry substantial weight. *Sunshine State Bank v.*

FDIC, 783 F.2d 1580, 1582-84 (11th Cir. 1986). The fact that Washburn might have presented a persuasive defense does not retroactively affect the reasonableness of OCC's decision to proceed against Washburn.

I conclude that OCC's position was reasonably based in law and fact and, therefore, substantially justified within the meaning of EAJA. Washburn's application, therefore, must be denied.

FINDINGS OF FACT

The foregoing constitutes my findings of fact.

CONCLUSIONS OF LAW

1. Washburn meets the eligibility requirements of EAJA.

2. Washburn was the prevailing party in the underlying proceeding.

3. Enforcement Counsel's position in the underlying proceeding was substantially justified.

4. An EAJA award is inappropriate.

ORDER

Washburn's application for an EAJA award is denied.

So ordered, this 4th day of February, 2002.

/s/ _____
Ann Z. Cook
Administrative Law Judge

APPENDIX E

Statutes and Regulations Involved

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Federal Statutes

12 U.S.C. § 1818(i)(2) 24a
12 U.S.C. § 1818(s)(1) 27a
12 U.S.C. § 1818(s)(3) 28a
31 U.S.C. § 5321 . . . . . 29a
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Federal Regulations

12 C.F.R. § 21.21 . . . . . 34a
31 C.F.R. § 103.22(b)(1) 36a
31 C.F.R. § 103.56 . . . . . 37a
31 C.F.R. § 103.57 . . . . . 41a

[Authority to Impose a Civil Money Penalty Order]

12 U.S.C. § 1818(i)(2)

(i)(2) CIVIL MONEY PENALTY.--

(A) FIRST TIER.--Any insured depository institution which, and any institution-affiliated party who--

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) or any final order under section 38 or 39;

(iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) SECOND TIER.--Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who--

(i) (I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--
(I) is part of a pattern of misconduct;
(II) causes or is likely to cause more than a minimal loss to such depository institution; or
(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) THIRD TIER.--Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who--
(i) knowingly--
(I) commits any violation described in any clause of subparagraph (A);
(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or
(III) breaches any fiduciary duty; and
(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation

described in subparagraph (c).--The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is--

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of–

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

[Banking Agencies Required to Promulgate Regulations to Monitor Compliance with Bank Secrecy Act]

12 U.S.C. § 1818(s)(1)

(s) Compliance With Monetary Transaction Recordkeeping and Reporting Requirements.-

(1) COMPLIANCE PROCEDURES REQUIRED.-- Each appropriate Federal banking agency shall prescribe regulations requiring insured depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions with the requirements of subchapter II of chapter 53 of title 31, United States Code.[1]

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[1] The reference "subchapter II of chapter 53 of title 31, United States Code" is to 31 U.S.C. §§ 5311-5330 and is commonly referred to as the "Bank Secrecy Act."

[Enforcement Sanction for Violations of Regulations Promulgated Pursuant to 12 U.S.C. § 1818(s)(1)]

12 U.S.C. § 1818(s)(3)

(3) ORDER TO COMPLY WITH REQUIREMENTS.--If the appropriate Federal banking agency determines that an insured depository institution--

(A) has failed to establish and maintain the procedures described in paragraph (1);[2] or

(B) has failed to correct any problem with the procedures maintained by such depository institution which was previously reported to the depository institution by such agency,

the agency shall[3] issue an order in the manner prescribed in subsection (b) or (c)[4] requiring such depository institution to cease and desist from its violation of this subsection or regulations prescribed under this subsection.

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[2] The referenced paragraph is 12 U.S.C. § 1818(s)(1).

[3] The term "shall" is used in the mandatory sense since the federal banking agencies already had the authority to impose a cease and desist order for violations of laws and regulations under 12 U.S.C. §§ 1818 (b) and (c) in 1986 when 12 U.S.C. 1818(s)(3) was enacted.

[4] The referenced subsections are to 12 U.S.C. §§ 1818(b) and 1818(c).

[Authority of Treasury to Impose Civil Money Penalties]

31 U.S.C. § 5321

5321. - Civil penalties
(a) [This subsection is not titled]

(1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except sections 5314 and 5315 of this title or a regulation prescribed under sections 5314 and 5315) is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000. For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited under section 5317(b) of this title.

(3) A person not filing a report under a regulation prescribed under section 5315 of this title or not complying with an injunction under section 5320 of this title enjoining a violation of, or enforcing compliance with, section 5315 or a regulation prescribed under section 5315, is liable to the Government for a civil penalty of not more than $10,000.

(4) Structured Transaction Violation. -

(A) Penalty authorized. The Secretary of the Treasury may impose a civil money penalty on any person who violates any provision of section 5324.

(B) Maximum amount limitation. The amount of any civil money penalty imposed under subparagraph (A) shall not exceed the amount of the coins and currency (or such other monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed.

(C) Coordination with forfeiture provision. The amount of any civil money penalty imposed by the Secretary under subparagraph (A) shall be reduced by the amount of any forfeiture to the United States in connection with the transaction with respect to which such penalty is imposed.

(5) Foreign Financial Agency Transaction Violation. -

(A) Penalty authorized. The Secretary of the Treasury may impose a civil money penalty on any person who willfully violates or any person willfully causing any violation of any provision of section 5314.

(B) Maximum amount limitation. The amount of any civil money penalty imposed under subparagraph (A) shall not exceed -

(i) in the case of violation of such section involving a transaction, the greater of

(I) the amount (not to exceed $100,000) of the transaction; or

(II) $25,000; and

(ii) in the case of violation of such section involving a failure to report the existence of an account or any identifying information required to be provided with respect to such account, the greater of

(I) an amount (not to exceed $100,000) equal to the balance in the account at the time of the violation; or

(II) $25,000.

(6) Negligence.-

(A) In general. The Secretary of the Treasury may impose a civil money penalty of not more than $500 on any financial institution which negligently violates any provision of this subchapter or any regulation prescribed under this subchapter.

(B) Pattern of negligent activity. If any financial institution engages in a pattern of negligent violations of any provision of this subchapter or any regulation prescribed under this subchapter, the Secretary of the Treasury may, in addition to any penalty imposed under subparagraph (A) with respect to any such violation, impose a civil

money penalty of not more than $50,000 on the financial institution.

(b) Time Limitations for Assessments and Commencement of Civil Actions. -

(1) Assessments. The Secretary of the Treasury may assess a civil penalty under subsection (a) at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed.

(2) Civil actions. The Secretary may commence a civil action to recover a civil penalty assessed under subsection (a) at any time before the end of the 2-year period beginning on the later of -

(A) the date the penalty was assessed; or

(B) the date any judgment becomes final in any criminal action under section 5322 in connection with the same transaction with respect to which the penalty is assessed.

(c) The Secretary may remit any part of a forfeiture under subsection (c) or (d)[5] of section 5317 of this title or civil penalty under subsection (a)(2) of this section.

(d) Criminal Penalty Not Exclusive of Civil Penalty. A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the

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[5] So written in the original enactment. Section 5317 does not contain a paragraph (d).

fact that a criminal penalty is imposed with respect to the same violation.

(e) Delegation of Assessment Authority to Banking Agencies.

(1) In general. The Secretary of the Treasury shall delegate, in accordance with section 5318(a)(1) and subject to such terms and conditions as the Secretary may impose in accordance with paragraph (3), any authority of the Secretary to assess a civil money penalty under this section on depository institutions (as defined in section 3 of the Federal Deposit Insurance Act) to the appropriate Federal banking agencies (as defined in such section 3).

(2) Authority of agencies. Subject to any term or condition imposed by the Secretary of the Treasury under paragraph (3), the provisions of this section shall apply to an appropriate Federal banking agency to which is delegated any authority of the Secretary under this section in the same manner such provisions apply to the Secretary.

(3) Terms and conditions.

(A) In general. The Secretary of the Treasury shall prescribe by regulation the terms and conditions which shall apply to any delegation under paragraph (1).

(B) Maximum dollar amount. The terms and conditions authorized under subparagraph (A) may include, in the Secretary's sole discretion, a limitation on the amount of any civil penalty which may be assessed by an appropriate Federal banking agency pursuant to a delegation under paragraph (1).

[National Bank BSA Compliance Procedures]

12 C.F.R. § 21.21

§21.21 BANK SECRECY ACT COMPLIANCE.[6]

(a) Purpose. This subpart is issued to assure that all national banks establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code,[7] and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR part 103.

(b) Compliance procedures. On or before April 27, 1987, each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR part 103. The compliance program shall be reduced to writing, approved by the board of directors and noted in the minutes.

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[6] This regulation was promulgated by the OCC pursuant to and in implementation of 12 U.S.C. § 1818(s)(1).

[7] The reference "subchapter II of chapter 53 of title 31, United States Code" is to 31 U.S.C. §§ 5311-5330 and is commonly referred to as the "Bank Secrecy Act."

(c) Contents of compliance program. The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party;

(3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

[All Federally Insured Depository Institutions Required to File CurrencyTransaction Reports]

31 C.F.R. § 103.22(b)(1)

Sec. 103.22 Reports of transactions in currency.

(a) General. This section sets forth the rules for the reporting by financial institutions of transactions in currency. The reporting obligations themselves are stated in paragraph (b) of this section. The reporting rules relating to aggregation are stated in paragraph (c) of this section. Rules permitting banks to exempt certain transactions from the reporting obligations appear in paragraph (d) of this section.

(b) Filing obligations--(1) Financial institutions other than casinos. Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000, except as otherwise provided in this section. In the case of the Postal Service, the obligation contained in the preceding sentence shall not apply to payments or transfers made solely in connection with the purchase of postage or philatelic products.

[Treasury Authority to Enforce Bank Secrecy Act and BSA-Based Implementing Regulations]

31 C.F.R. § 103.56

Section 103.56 Enforcement.

(a) Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this part, is delegated to the Assistant Secretary (Enforcement).

(b) Authority to examine institutions to determine compliance with the requirements of this part is delegated as follows:

(1) To the Comptroller of the Currency with respect to those financial institutions regularly examined for safety and soundness by national bank examiners;

(2) To the Board of Governors of the Federal Reserve System with respect to those financial institutions regularly examined for safety and soundness by Federal Reserve bank examiners;

(3) To the Federal Deposit Insurance Corporation with respect to those financial institutions regularly examined for safety and soundness by FDIC bank examiners;

(4) To the Federal Home Loan Bank Board with

respect to those financial institutions regularly examined for safety and soundness by FHLBB bank examiners;

(5) To the Chairman of the Board of the National Credit Union Administration with respect to those financial institutions regularly examined for safety and soundness by NCUA examiners.

(6) To the Securities and Exchange Commission with respect to brokers and dealers in securities and investment companies as that term is defined in the Investment Company Act of 1940 (15 U.S.C. 80-1 et seq.);

(7) To the Commissioner of Customs with respect to Secs. 103.23 and 103.58;

(8) To the Commissioner of Internal Revenue with respect to all financial institutions, except brokers or dealers in securities, not currently examined by Federal bank supervisory agencies for soundness and safety.

(c) Authority for investigating criminal violations of this part is delegated as follows:

(1) To the Commissioner of Customs with respect to Sec. 103.23;

(2) To the Commissioner of Internal Revenue except with respect to Sec. 103.23.

(d) Authority for the imposition of civil penalties for violations of this part lies with the Assistant Secretary, and in the Assistant Secretary's absence, the Deputy Assistant Secretary (Law Enforcement).

(e) Periodic reports shall be made to the Assistant Secretary by each agency to which compliance authority has been delegated under paragraph (b) of this section. These reports shall be in such a form and submitted at such intervals as the Assistant Secretary may direct. Evidence of specific violations of any of the requirements of this part may be submitted to the Assistant Secretary at any time.

(f) The Assistant Secretary or his delegate, and any agency to which compliance has been delegated under paragraph (b) of this section, may examine any books, papers, records, or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this part.

(g) The authority to enforce the provisions of 31 U.S.C. 5314 and Secs. 103.24 and 103.32 of this part has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and Secs. 103.24 and 103.32 of this part, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 103.57; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2)) of this section); employ the summons power of subpart F of part 103; issue

administrative rulings under subpart G of part 103; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

[Authority of Treasury to Impose Civil Money Penalties]

12 C.F.R. § 103.57

Section 103.57 Civil penalty.

(a) For any willful violation, committed on or before October 12, 1984, of any reporting requirement for financial institutions under this part or of any recordkeeping requirements of Sec. 103.22, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not to exceed $1,000.

(b) For any willful violation committed after October 12, 1984 and before October 28, 1986, of any reporting requirement for financial institutions under this part or of the recordkeeping requirements of Sec. 103.32, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not to exceed $10,000.

(c) For any willful violation of any recordkeeping requirement for financial institutions, except violations of Sec. 103.32, under this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not to exceed $1,000.

(d) For any failure to file a report required under Sec.

103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Sec. 103.58.

(e) For any willful violation of Sec. 103.63 committed after January 26, 1987, the Secretary may assess upon any person a civil penalty not to exceed the amount of coins and currency involved in the transaction with respect to which such penalty is imposed. The amount of any civil penalty assessed under this paragraph shall be reduced by the amount of any forfeiture to the United States in connection with the transaction for which the penalty was imposed.

(f) For any willful violation committed after October 27, 1986, of any reporting requirement for financial institutions under this part (except Sec. 103.24, Sec. 103.25 or Sec. 103.32), the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) involved in the transaction or $25,000.

(g) For any willful violation committed after October 27, 1986, of any requirement of Sec. 103.24, Sec. 103.25, or Sec. 103.32, the Secretary may assess upon any person, a civil penalty:

(1) In the case of a violation of Sec. 103.25 involving a transaction, a civil penalty not to exceed the

greater of the amount (not to exceed $100,000) of the transaction, or $25,000; and

(2) In the case of a violation of Sec. 103.24 or Sec. 103.32 involving a failure to report the existence of an account or any identifying information required to be provided with respect to such account, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation, or $25,000.

(h) For each negligent violation of any requirement of this part, committed after October 27, 1986, the Secretary may assess upon any financial institution a civil penalty not to exceed $500.

APPENDIX F

Legislative History and Miscellaneous Materials

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1994 U.S.C.C.A.N. 1977, pp. 2020-21
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P.L. 103-325, RIEGLE COMMUNITY DEVELOPMENT AND REGULATORY IMPROVEMENT ACT OF 1994
HOUSE CONFERENCE REPORT NO. 103-652
August 2, 1994

IMPOSITION OF CIVIL PENALTIES UNDER THE BSA

The failure to file reports required by the BSA can result in criminal and civil penalties, depending on the nature of the violation. Criminal investigations are the responsibility of IRS's Criminal Investigation Division. Civil penalties are assessed by the Department of the Treasury's Office of Financial Enforcement (OFE). Civil penalties can range from $500 for negligent violations and from $25,000 to $100,000 per willful violation.

OFE currently receives civil penalty referrals from Federal banking agencies, the IRS, financial institutions and others. OFE sends each referral to IRS's Criminal Investigative Division to determine whether it should be handled as a criminal investigation or whether such an investigation is already underway. Once OFE receives

clearances from IRS to pursue a civil penalty case, the referral is categorized as formal and assigned to a BSA specialist for processing. The Assistant Secretary for Enforcement makes the final decision to assess a penalty.

In the past, OFE did not process BSA civil penalty cases in a timely manner. In some instances, OFE was so slow that cases had to be closed because the statute of limitations expired. From 1985-1991, case processing times averaged 21 months, according to the GAO. While OFE's record has improved substantially in the last few years, the Conferees believe that it would be more efficient to allow the Federal banking agencies to impose civil penalties directly.

Section 406 of the Conference Report requires the Secretary to delegate any authority to assess a civil money penalty on depository institutions under the BSA to the appropriate Federal banking agencies, subject to any term or condition imposed by the Secretary. Because these agencies already examine depository institutions for BSA compliance, the authority to impose penalties flows naturally from their current responsibilities. Furthermore, the Federal banking agencies currently have penalty authority and experience under other banking laws. OFE would still be able to oversee the process and ensure that penalties are consistently imposed. OFE would also continue to promulgate the regulations under which any penalties would be imposed.

The Assistant Secretary of the Treasury for Enforcement testified before the House Subcommittee on Financial Institutions that "serious consideration should be given to delegation of penalty assessment not only to the Federal banking agencies, but also to IRS for the non-bank financial

institutions and to Customs for CMIR violators." The Conferees fully support any additional delegations of civil penalty enforcement authority if appropriate for Treasury to do so, and if the result is a more efficient system.

1994 W.L. 224698

Testimony
March 15, 1994
Senate
Banking

EXCERPTS OF STATEMENT OF
THE HONORABLE RONALD K. NOBLE
ASSISTANT SECRETARY FOR ENFORCEMENT
U.S. DEPARTMENT OF THE TREASURY

BEFORE THE SENATE COMMITTEE ON
BANKING, HOUSING AND URBAN AFFAIRS

MARCH 15, 1994

Assistant Secretary Noble is pleased to testify on S.,1664, "The Anti-Money Laundering Act of 1994 and to update the Committee on Treasury initiatives in the field of money laundering and Bank Secrecy Act enforcement.

Last Fall, Treasury established a Treasury Money Laundering, Task Force to take a comprehensive look at Treasury's anti-money laundering programs, especially how Treasury exercises its authority under the Bank Secrecy Act.

A top priority of the Task Force has been to reduce the regulatory burden on financial institutions. It has made a series of recommendations, including improving the Currency Transaction Report, simplifying the CTR exemption procedure available to banks, and streamlining suspicious transactions reporting.

To broaden and regularize communication with the banking and other industries affected by currency reporting, Treasury has established a Bank Secrecy Act Advisory Group composed of 30 government and private experts in the field.

The Bank Secrecy Advisory Group will begin meeting on April 8, 1994, and will serve as a think tank for ideas on how both government and financial institutions should fulfill their responsibilities to prevent and detect money laundering.

Treasury can squarely endorse S. 1664, which was developed in close cooperation with-Treasury staff. Many of the provisions in the bill correspond to the recommendations of the Money Laundering Task Force.

Chairman Riegle and Members of the Committee, the Department of the Treasury is happy to have an opportunity to testify on S. 1664, the Anti-Money Laundering Act of 1994, introduced by Senators Bryan, Bond, and Riegle, and to update the Committee on Treasury's activities in the field of money laundering and Bank Secrecy Act enforcement. We also wish to express our appreciation for the responsiveness of the Committee staff to Treasury's concerns as this bill was developed. The result has been a bill which Treasury can squarely endorse.

* * * *

S. 1664

Now I would like to turn to S. 1664. This bill was developed in close cooperation with Treasury and is parallel to H.R. 3235 which was marked up and reported on last week by the

House Banking Committee. These bills were born from some of the same concerns that caused Treasury to establish the Money Laundering Task Force and Bank Secrecy Act Advisory Group -- that aspects of our enforcement programs have become dated, inefficient, and are in need of substantial revision. Several provisions in the bill correspond to the thinking and recommendations of the Task Force.

* * * *

Section 6 --- Imposition of BSA Civil Penalties by Banking Agencies

This section directs the Secretary to delegate the authority to assess BSA civil penalties to the federal banking agencies (OCC, the Federal Reserve, OTS, FDIC, and NCUA). From the inception of the BSA,, Treasury has delegated compliance and examination authority to these agencies.

Under section 6, the Secretary would be given complete discretion to set the terms and conditions for civil penalties, including the ability to reserve the authority to assess or review penalties over a certain dollar amount. The provision stems from congressional criticism of the handling of civil penalties in the past by the Treasury's office of Financial Enforcement (OFE). I want to emphasize that past penalty processing delays have been corrected and that OFE has produced an unprecedented number of penalties in recent years.

Nevertheless, I am of the view that serious consideration should be given to delegation of this operational function

not only to the banking agencies, but to IRS for the non-bank financial institutions and to Customs for CMIR violations. All of these agencies have penalty authority and experience under other statutes.

* * * *

Conclusion

I hope that I have conveyed that it is not business as usual at the Department of the Treasury. We are open to new ideas and are committed to better communication with the affected public. The establishment of the Task Force and BSA Advisory Group are testament to our commitment.

We welcome the Committee's partnership with Treasury in improving the efficiency and effectiveness of our programs. Treasury and the Committee are working towards a common goal -- to reach a better balance and perspective on the roles and responsibilities of the Government and financial institutions in the fight against money laundering and better deployment of our respective skills and resources.

RONALD K. NOBLE
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Department of Treasury
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